IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 664 of 2005.

Date of decision: 06.01.2006.

Yogeshwar Lal & Ors. ... Appellants

Versus

Rajesh Kumar & Ors. … Respondents

Coram :

The Hon'ble Mr. Justice V.M. Jain, Judge.

Whether approved for reporting?[1]

For the appellants: Mr. N.K. Thakur, Advocate.

For the respondents: Nemo.

V.M. Jain, J. (Oral):

This Regular Second Appeal has been filed by the plaintiffs – appellants, against the judgment and decree dated 6.10.2005 passed by the District Judge, whereby the appeal filed by the defendants was allowed, the judgment and decree of the trial Court were set aside and the suit of the plaintiffs was dismissed.

The facts which are relevant for the decision of the present appeal are that the plaintiffs had filed a suit for permanent prohibitory and mandatory injunction against the defendants, with the allegations that the plaintiffs have a shop over the land detailed in the plaint, which was owned and possessed by the plaintiffs and that the defendants have no right, title or interest in respect of the said land/property. It was alleged

[1]Whether reporters of Local Papers may be allowed to see the judgment?

that the defendants started digging the land adjacent to the wall of the plaintiffs which is 13 feet in length and 2 feet in width. It was alleged that if the digging work by the defendants was not stopped, the said wall of the house of the plaintiffs was likely to fall and thereby the shop of the plaintiffs would also fall. It was alleged that the defendants were asked not to dig the land beneath the wall of the plaintiffs and not to cause damage to the said wall, but of no avail. It was accordingly prayed that the defendants be restrained from doing digging work near the wall of the plaintiffs and not to cause any damage to the said wall of the plaintiffs. In the alternative, it was prayed that in case the defendants pull down the wall and raise any construction or structure over the suit land, the same be got demolished and possession be restored to the plaintiffs.

In the written statement, the contesting defendants did not contest the ownership and possession of the plaintiffs over the shop in question. However, it was denied that the defendants were digging over the suit land. On the other hand, it was pleaded that the defendants had already demolished their house, which was situated over the land comprised in Khasra No. 7477, which was adjoining the suit land and that new building was to be constructed thereon. It was alleged that the back wall of the house of the defendants was existing over the land comprised in Khasra No. 7477 and the defendants intended to demolish the said wall and thereafter, they wanted to construct their building. It was alleged that no damage had so far been caused to the suit land nor any encroachment had been made over any part of the suit land. It was alleged that the defendants intended to raise construction over their own land comprised in Khasra No. 7477. It was alleged that no digging was

being done by the defendants and as such, the plaintiffs had no locus standi to file the suit. It was alleged that the roof of the plaintiffs was under the eaves (projecting edge of the roof) of the defendants' house and the water from the roof of the defendants' house use to fall over the house of the plaintiffs. It was alleged that the plaintiffs had filed the present suit just to harass the defendants.

After hearing both sides and perusing the record, the learned trial Court decreed the suit of the plaintiffs and a decree for injunction was passed restraining the defendants from conducting any digging over the suit land beneath the eaves touching the wall of the shop of the plaintiffs. Aggrieved against the same, the defendants filed appeal. The learned District Judge, after hearing both sides and perusing the record, accepted the appeal of the defendants, set aside the judgment and decree of the trial Court and dismissed the suit of the plaintiffs. Aggrieved against the same, the plaintiffs filed the present Regular Second Appeal in this Court.

After hearing the learned counsel appearing for the appellants and perusing the record, in my opinion, there is no merit in this appeal and the same is liable to be dismissed. It is not the case of the plaintiffs – appellants that the defendants were digging any part of the suit land owned or possessed by the plaintiffs, nor it is the case of the plaintiffs that the defendants were demolishing the wall of the plaintiffs over the suit land. On the other hand, the case of the plaintiffs is that the defendants be restrained from digging their own land and/or demolishing the construction over their own land, as the same was "likely to damage the wall of the shop of the plaintiffs". The defendants in the written statement categorically alleged that they had already demolished

the house existing over their own land in Khasra No. 7477 and there was one wall in existence, which they wanted to demolish and thereafter to raise construction of a new building. Nothing has come on the record to show that upto the time of the filing of the suit or at any time thereafter, any part of the construction raised by the plaintiffs, over their own land including the wall of the shop of the plaintiffs, got damaged by the demolition already made by the defendants. Admittedly, the wall which the defendants wanted to demolish is existing on their own land comprised in Khasra No. 7477 and is different from the wall of the shop of the plaintiffs, which is comprised in Khasra No. 7465. Since the defendants were demolishing their own construction over their own land comprised in Khasra No. 7477 and were not demolishing the construction of the plaintiffs over their land comprised in Khasra No. 7465, in my opinion, no case was made out for granting a decree for permanent prohibitory injunction against the defendants, even if the defendants wanted to construct a new building after demolishing the wall, especially when the defendants wanted to raise construction over their own land.

As referred to above, the case of the plaintiffs was that by demolishing the wall by the defendants in their own land and/or undertaking any digging work in their own land, the wall of the shop of the plaintiffs was likely to be damaged. As referred to above, so far no damage had been done. The question as to whether on account of digging and/or raising construction by the defendants in their own land, the wall of the shop of the plaintiffs was likely to be damaged or not, in my opinion, could be better judged by an expert in this regard. Only an expert could tell as to whether by undertaking the digging work and/or

raising construction by the defendants in their own land (after demolishing the existing construction), the existing building of the plaintiffs, including the wall of their shop, was likely to be damaged or not. However, for the reasons best known to them, the plaintiffs failed to examine any expert in this regard. In the absence of the evidence of an expert, in my opinion, it could not be said that the apprehension of the plaintiffs had any foundation. On the other hand, it could be said that the apprehension of the plaintiffs is unfounded. This is especially so, when the defendants in the written statement had categorically stated that they had already demolished the construction over their land and only one wall remains to be demolished and that no damage had so far been caused to the construction of the plaintiffs over their land.

The learned District Judge while accepting the appeal of the defendants and dismissing the suit of the plaintiffs had categorically found as under:-

> "Apart from it, no building engineer as expert was examined by the plaintiffs in order to show that by digging operation of the defendants, there is danger to the wall of the shop of the plaintiffs."

In my opinion, the aforesaid view taken by the learned District Judge is perfectly in accordance with law, especially when the defendants were digging and/or constructing on their own land, comprised in Khasra No. 7477, while the shop of the plaintiffs is over the land comprised in Khasra No. 7465 and it is not the case of the plaintiffs that the defendants were demolishing any construction over the land of the plaintiffs or were raising any construction over the land of the plaintiffs.

In view of the detailed discussion above, in my opinion, no fault could be found with the findings of the learned District Judge, especially when while coming to these findings the learned District Judge had considered the entire material available on the record. As referred to above, in the absence of any material on the record, to justify the apprehension in the mind of the plaintiffs, in my opinion, the learned District Judge had rightly dismissed the suit of the plaintiffs and no fault could be found with the same. Furthermore, no question of law, much less a substantial questions of law arises for determination in this appeal.

In view of the detailed discussion above, finding no merit in this appeal, the same is hereby dismissed.

Before parting, it may be observed that the contesting defendants, while digging their own land and/or raising construction over their own land, were expected to take all necessary precautions, like a prudent man, so as not to affect the existing construction of the plaintiffs over their own land.

CMP No. 1153 of 205:

In view of the dismissal of the main appeal, this application has become infructuous.

(V.M. Jain),
Judge

January 06, 2006
(BSS)